Supreme Court, U.S.
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No. ——

In The Supreme Court of the United States

October Term, 1996

Vincent L. Pryner,
Petitioner,

v.

Tractor Supply Company, Inc.,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Are collective bargaining agreements outside the transportation industry covered by the Federal Arbitration Act, 9 U.S.C. § 1 et seq.?

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IN THE

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v.

TRACTOR SUPPLY COMPANY, INC.,
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Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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PETITION FOR WRIT OF CERTIORARI

Vincent L. Pryner—the plaintiff in this case in the trial court and appellee in the court of appeals—respectfully cross-petitions for a writ of certiorari, conditioned upon this Court's granting the petition for a writ of certiorari in *Tractor Supply Company, Inc. v. Pryner*, No. 96-1830. In its petition, Tractor Supply seeks review of the merits question decided by the United States Court of Appeals for the Seventh Circuit in *Pryner v. Tractor Supply Company, Inc.*, 109 F.3d 354 (7th Cir. 1997). If Tractor's petition in No. 96-1830 is granted, this Court should also grant this petition so that it can consider a threshold ques-

tion decided by the Seventh Circuit in this case that is not included within the question presented in No. 96-1830.

OPINIONS BELOW

The Seventh Circuit's decision and judgment in this case is reported at 109 F.3d 354 (7th Cir. 1997) and is reprinted in the Appendix to the Petition for Writ of Certiorari (Pet. App.), at Pet. App. 1. The underlying district court opinion is reported at 927 F. Supp. 1140 (S.D. Ind. 1996) and appears at Pet. App. 28-44. Cross-petitioner Mr. Pryner is relying upon the Appendix to Tractor Supply Company's petition in No. 96-1830.

JURISDICTION

The judgment of the United States Court of Appeals for the Seventh Circuit was entered on March 20, 1997. On June 6, 1997, Justice Stevens extended the date for filing this petition for writ of certiorari until July 18, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 1 of the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1, provides in relevant part:

> [N]othing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.

Section 2 of the FAA, 9 U.S.C. § 2, provides:

> A written provision in any maritime transaction or contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing

> controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

Section 16(a)(1)(A) of the FAA, 9 U.S.C. § 16(a)(1)(A), provides:

> (a) An appeal may be taken from . . . (1) an order . . . (A) refusing a stay of any action under section 3 of this title.

STATEMENT OF THE CASE

Mr. Pryner brought this suit in 1995, asserting that Tractor Supply violated Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.*, the Americans with Disabilities Act of 1990, 42 U.S.C. § 12101, and 42 U.S.C. § 1981 when the Company suspended and discharged him as a Tractor Supply employee.

Prior to his discharge Mr. Pryner had been employed under a collective bargaining agreement between Tractor Supply and his union, Teamsters Local No. 135. That agreement creates a grievance procedure culminating in final and binding arbitration, prohibits Tractor Supply from discharging any covered employee without "just cause," and contains a provision prohibiting Tractor Supply and Local No. 135 from discriminating against any employee on the basis of race, color, religion, national origin, sex or age.

Tractor Supply moved to stay the district court action pursuant to § 3 of the FAA, 9 U.S.C. § 3, contending that Mr. Pryner should be compelled to pursue arbitration under the arbitration provision in the collective bargaining agreement rather than proceeding to trial. On May 28, 1996, the district court denied Tractor Supply's motion to stay proceedings, and ordered the case to go to trial. Pet. App. 44.

Tractor Supply thereupon took an interlocutory appeal to the Seventh Circuit from the denial of the stay, relying

on § 16 of the FAA, 9 U.S.C. § 16(a)(1)(A), as the basis for that appeal. Days before the trial was scheduled to begin, Tractor Supply applied to the Seventh Circuit for a stay of the trial. On July 31, 1996, the Seventh Circuit issued an order granting the stay.

On March 20, 1997, the Seventh Circuit issued its decision on the appeal. Pet. App. 1. Before reaching the merits of the question whether the district court properly refused to order arbitration—the question that is the subject of the petition in No. 96-1830—the court of appeals considered at length a preliminary issue it viewed as determinative of the propriety of the interlocutory appeal—whether and if so, with regard to what issues, the FAA covers collective bargaining agreements.

The FAA, in § 16, expressly provides for appeals from district court refusals to issue a stay pending arbitration. Section 16 of the FAA, however, only provides for such appeals, as one would expect, in cases that are otherwise within the coverage of that statute. And § 1 of the FAA provides that "nothing [in the FAA] shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." The court of appeals therefore had to determine whether "arbitration clauses in collective bargaining agreements other than in the maritime, railroad and other transportation industries [are] subject to the Federal Arbitration Act, 9 U.S.C. §§ 1 *et seq.*". (Pet. App. at 3).[1] If so, then FAA § 16 provided the authority to hear the interlocutory appeal.

The court below began its discussion of the reach of the FAA § 1 exclusion as applied to collective bargaining

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[1] The reason the Seventh Circuit posed the question by assuming that the FAA does not cover collective bargaining agreements in the "maritime, railroad and other transportation industries" is that it is universally acknowledged that under § 1 of the FAA, 9 U.S.C. § 1, there is an exclusion from the coverage of the Act for such agreements. *See* n.3 *infra*.

agreements by noting that the federal courts of appeal are in broad disarray on the question. Pet. App. 6-7. To reconcile cases decided by the Seventh Circuit itself that seem to point in opposite directions, some indicating that the FAA is pertinent in collective bargaining agreement arbitration cases and others applying only § 301 of the Labor Management Relations Act, 29 U.S.C. § 185, to resolve arbitration issues arising under collective bargaining agreements, the court of appeals then adopted an entirely new approach, quite different from those of all the other circuit courts.

The Seventh Circuit held that the FAA is "generally applicable" to collective bargaining agreements, excluding from its reach only those employment contracts governing workers who actually work in the transportation industries, but that "federal common law created under the aegis of section 301 is used to determine any substantive issues that arise in proceedings to vacate or enforce the arbitration award." Pet. App. 8. More specifically, the Seventh Circuit held that the procedural provisions of the FAA apply to the enforcement of arbitration clauses in non-transportation industry collective bargaining agreements, while provisions such as 9 U.S.C. § 10, concerning the standards for vacating arbitration awards, do not.[2] Viewing the availability of an appeal for an interlocutory order as a "quintessentially procedural question," (Pet. App. 13), the court of appeals concluded that FAA § 16 applies and that there therefore was jurisdiction over the appeal. Pet. App. 13.

Having so concluded, the Seventh Circuit went on to decide the merits, holding that, under this Court's decision in *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974),

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[2] The Seventh Circuit did not spell out in any detail which FAA provisions it considers procedural and which substantive, aside from its conclusions that the interloctuory appeal provision of § 16 is procedural, and the limitations period is substantive. Pet. App. 13.

the collective bargaining agreement governing Mr. Pryner's workplace did not waive his right to pursue his statutory anti-discrimination claims in federal court. Pet. App. 24-27. Tractor Supply filed a petition for a writ of certiorari on the merits on May 15, 1997, raising the question "Whether a voluntary agreement to arbitrate federal statutory employment discrimination claims is enforceable under *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), notwithstanding that it is part of a collective bargaining agreement." Mr. Pryner filed a Brief in Opposition to that petition on July 15, 1997.

REASONS FOR GRANTING THE WRIT

Tractor Supply has petitioned this Court for a writ of certiorari on the merits portion of the Seventh Circuit's decision in this case. Mr. Pryner opposes that petition, for the reasons set forth in his Brief in Opposition to that petition. If, however, this Court grants Tractor Supply's petition, the Court should also grant this cross-petition. Only by granting both petitions would the Court be in a position to decide the logically prior question whether the court below had jurisdiction over the appeal from the district court's interlocutory decision denying a stay of Mr. Pryner's suit pending arbitration (*viz,* the question presented by this petition), before deciding the logically subsequent merits question presented in Tractor Supply's petition.

The court of appeals ruled that it had jurisdiction over Tractor Supply's interlocutory appeal pursuant to the FAA. 9 U.S.C. § 16(a)(1)(A). But, as the Seventh Circuit discussed at length in its opinion in this case, the FAA expressly excludes from its coverage "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." FAA § 1, 9 U.S.C. § 1. Since the contract at issue in this case is one for employment and since Mr. Pryner is not a seaman, or a railroad employee, and does not otherwise hold employment in the transportation in-

dustry, the question whether the FAA § 1 excludes from the Act all contracts of employment, and, in particular, all collective bargaining agreements, or only those in the transportation industry, is determinative of whether FAA § 16 properly supplied the basis for the interlocutory appeal the court of appeals entertained.

1. The question whether the FAA excludes all "contracts of employment" from its coverage has been widely litigated in the federal courts over a period of over forty years—accelerating recently with at least five courts of appeals addressing the issue within the last six months—with results that vary all over the lot. The law on this question is in disarray because it is the product of two longstanding, somewhat independent, sets of distinctions.

First, as already suggested, a number of courts of appeals have distinguished between contracts of employment in the transportation industry and such contracts in all other industries, holding transportation industry employment contracts *only* to be outside the coverage of the FAA. Second, several federal appellate courts have distinguished, explicitly or implicitly, between *individual* contracts of employment and *collective bargaining agreements,* holding that the FAA does not cover collective bargaining agreements even when it does cover individual contracts of employment. To those two distinctions, which courts of appeals have mixed-and-matched in various configurations, is now added a third—the Seventh Circuit's innovation in this case, creating a distinction between procedural and substantive issues where collective bargaining agreements are concerned.

The result is that there is uniformity among the circuits only on one, preliminary point pertaining to the application of the FAA to a case such as this one, involving a collective bargaining agreement: All the circuits to address the issue have concluded that collective bargaining agreements are "contracts of employment" within the meaning of § 1, and therefore potentially excluded from

the coverage of the FAA.[3] On all the other interrelated questions the answers to which collectively determine whether a particular collective bargaining agreement is or is not covered by the FAA or a particular provision thereof, the circuits are now divided into at least five different camps.

First, the Tenth Circuit and, it appears, the Ninth, hold that FAA § 1 excludes *all* collective bargaining agreements from the coverage of the Act, but have not decided the question whether all individual contracts of employment are excluded or not. *Harrison v. Eddy Potash Inc.*, 112 F.3d 1437 (10th Cir. 1997); *United Food and Commercial Workers v. Safeway*, 889 F.2d 940, 943-44 (10th Cir. 1989); *see also Kemner v. Dist. Council of Painting and Allied Trades 36*, 768 F.2d 1115, 1118 n.1 (9th Cir. 1985); *American Postal Workers Union v. United States Postal Serv.*, 861 F.2d 211, 215 n.2 (9th Cir. 1985).

Second, the First, Fourth, Fifth and Sixth Circuits hold that while the FAA excludes all *collective bargaining agreements*, the Act excludes *individual* contracts of employment only for workers directly involved in the transportation industry. *Domino Sugar Corp. v. Sugar Work-*

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[3] *Posadas de Puerto Rico v. Asociasion de Empleados*, 873 F.2d 479, 482 (1st Cir. 1989); *Maryland Casualty Co. v. Realty Advisory Board on Labor Relations*, 107 F.3d 979, 982 (2d Cir. 1997); *Tenney Engineering, Inc. v. United Electrical Radio and Machine Workers*, 207 F.2d 450 (3d Cir. 1952); *Domino Sugar Corp. v. Sugar Workers Local 392*, 10 F.3d 1064, 1067 (4th Cir. 1993); *Bacashihua v. United States Postal Serv.*, 859 F.2d 402 (6th Cir. 1988); *Kemner v. District Council of Painting and Allied Trades 36*, 768 F.2d 1115, 1118 n.1 (9th Cir. 1985); *Harrison v. Eddy Potash, Inc.* 112 F.3d 1437 (10th Cir. 1997); *American Postal Workers Union v. United States Postal Serv.*, 823 F.2d 466, 472-73 (11th Cir. 1987); *see also American Postal Workers Union v. United States Postal Serv.*, 52 F.3d 359, 362 (D.C. Cir. 1995); *Service Employees Int'l Union Local 36 v. Office Center Services, Inc.*, 670 F.2d 404, 406-07 n.6 (3d Cir. 1982); *International Union of Electrical Radio and Machine Workers*, 715 F.2d 886, 889-890 (5th Cir. 1983).

ers Local 392, 10 F.3d 1064, 1067 (4th Cir. 1993); *O'Neil v. Hilton Head Hospital*, 115 F.3d 272 (4th Cir. 1997; *International Union of Elec. Radio & Machine Workers*, 715 F.2d 886, 889-891 (5th Cir. 1983); *Rojas v. TK Communications*, 87 F.3d 745, 748 (5th Cir. 1996); *Occidental Chemical Corp. v. Int'l. Chemical Workers Union*, 853 F.2d 1310, 1315 (6th Cir. 1988); *Bishop v. Philip Morris U.S.A.*, 771 F. Supp. 188, 189 (W.D. Ky. 1990), *aff'd. mem.*, 915 F.2d 1570 (6th Cir. 1990); *Asplundh Tree Experts Co. v. Bates*, 71 F.3d 592 (6th Cir. 1995); *Posadas de Puerto Rico v. Asociasion de Empleados*, 873 F.2d 479, 482 (1st Cir. 1989); *Dickstein v. DuPont*, 443 F.2d 783, 785 (1st Cir. 1971).

Of this group, only the Fourth Circuit has made explicit its differential treatment of collective bargaining agreements and individual employment contracts. *O'Neil v. Hilton Head Hospital, supra.* The remaining three circuits have decided cases that (1) hold, in a case involving individual employment contracts, that § 1 excludes from the Act's coverage *only* those workers in the transportation field, disregarding in so holding other cases in the same circuit that treat non-transportation industry collective bargaining agreements as excluded from the FAA. (*see Occidental*, 853 F.2d at 1315 (collective bargaining agreements); *Bishop*, 771 F. Supp. at 189 (same); *Asplundh*, 71 F.3d at 596 (individual contracts); *International Union of Elec. Radio*, 715 F.2d at 889-91 (collective bargaining agreements); *Rojas*, 87 F.3d at 748 (individual contracts)); or (2) hold the FAA inapplicable to all collective bargaining agreements, ignoring prior opinions declaring the FAA applicable to certain individual contracts of employment. *See Posadas*, 873 F.2d at 482 (collective bargaining agreement); *Dickstein* 443 F.2d at 785 (individual contract).[4]

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[4] Several of these cases raised the question in the context of determining whether the FAA statute of limitations should apply to cases arising under § 301 of the Labor Management Relations Act, 29 U.S.C. § 185, and the courts held that, because the FAA

Third, two additional circuits, the Eighth and D.C. Circuits, also limit the exclusion to workers in the transportation industry with respect to individual contracts, but have not decided whether or not the same rule applies to collective bargaining agreements. *Cole v. Burns*, 105 F.3d 1465 (D.C. Cir. 1997); *Patterson v. Tenet Healthcare, Inc.*, 113 F.3d 832 (8th Cir. 1997).

Fourth, two more circuits, the Second and Third, limit the exclusion with respect to *both* individual contracts of employment and collective bargaining agreements to workers in the transportation industry. *Maryland Casualty Co. v. Realty Advisory Board on Labor Relations*, 107 F.3d 979, 982 (2d Cir. 1997) (collective bargaining); *Erving v. Virginia Squires Basketball Club*, 468 F.2d 1064, 1069 (2d Cir. 1972) (individual contract);[5] *Tenney Engineering, Inc. v. United Electrical Radio and Machine Workers*, 207 F.2d 450 (3d Cir. 1952) (en banc) (collective

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§ 1 excludes collective bargaining agreements, the FAA statute of limitation (9 U.S.C. § 12) was inapplicable. *See Harry Hoffman*, 912 F.2d at 613; *Occidental*, 853 F.2d at 1315; *International Union of Elec. Radio*, 715 F.2d at 889-891; *Posadas*, 873 F.2d at 482. If these decisions were wrong and the FAA does indeed cover collective bargaining agreements for all purposes and thereby provides a statute of limitations in § 301 arbitration cases, then this Court's decisions determining the statute of limitations period for § 301 arbitration claims by borrowing from statutes other than the FAA were wrongly decided. *United Parcel Services v. Mitchell*, 451 U.S. 56 (1981); *DelCostello v. International Broth. of Teamsters*, 462 U.S. 151 (1983). Yet, not once in any of these opinions exploring the law governing the limitations period in a case concerning the application of an arbitration clause contained in a collective bargaining agreement did the Court, or any of the concurring or dissenting Justices for that matter, suggest that the FAA provides the limitations period.

[5] In yet another display of internal disarray within the circuits, the Second Circuit's recent ruling in *Maryland Casualty* that the FAA applies to collective bargaining agreements ignored its prior case law stating that collective bargaining agreements are affirmatively *excluded* from the Act. *Compare Maryland Casualty*, 107 F.3d at 982 with *Harry Hoffman Printing*, 912 F.2d at 613.

bargaining agreements); *Great Western Mortgage Corp. v. Peacock*, 110 F.3d 222 (3d Cir. 1997) (individual contracts).

Finally, the Seventh Circuit in this case decided that while the FAA does apply to individual contracts of employment outside the transportation industry, for collective bargaining agreements outside that industry the FAA applies to procedural issues such as the availability of interlocutory appeals but not to substantive issues such as the standards for vacating an arbitration award. Pet. App. at 6-7 (discussing the circuit conflicts).[6]

Questions concerning the application of the FAA to contracts of employment, now dividing the circuits into so many factions, have been fully briefed to this Court twice, in *Textile Workers v. Lincoln Mills*, 353 U.S. 448 (1957), and its companion cases, and again in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991). *See e.g.*, Brief for the Petitioner in *General Electric Co. v. Local 205, United Electrical Workers*, Oct. term 1956 No. 276, at 10-30; *id.* Brief for Respondent, at 43-55; Brief for the American Federation of Labor and Congress of Industrial Organizations as Amicus Curiae in Support of Petitioner in *Gilmer*, Oct. term 1990, No. 90-18. In *Lincoln Mills*, the Court did not decide any FAA question, holding instead that § 301 creates a federal common law of labor contracts governing the enforceability of arbitration clauses in collective bargaining agreements,[7] 353 U.S. at 456-57. In *Gilmer*, the Court expressly declined

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[6] The Eleventh Circuit has expressly left open the question of whether the FAA § 1 exclusion is limited to workers in the transportation industry. *American Postal Workers Union*, 823 F.2d at 472-73.

[7] Justice Frankfurter, in his dissent in *Lincoln Mills*, perceived in the Court's silence a "rejection though not explicit of the availability of the . . . Arbitration Act to enforce arbitration clauses in collective bargaining agreements." 353 U.S. at 466 (Frankfurter, J., dissenting).

to rule on the question whether all contracts of employment are within the FAA § 1 exclusion, deciding that the contract at issue in that case was not an employment agreement at all, stating that "we leave for another day the issue" whether "that section excludes from the coverage of the FAA all 'contracts of employment.'" 500 U.S. at 25, n.2.[8]

While this Court has left that issue and the related issues undecided, the disarray in the circuits has proliferated, with this case adding an entirely new ingredient—the Seventh Circuit's procedural/substantive distinction—to the mix. And the present case poses the question of the scope of the FAA's coverage of collective bargaining agreements in a context where the answer to that question is determinative of whether the case was properly before the appellate court at all. If the Court does decide to review the case on the merits, it should take this opportunity to review as well the threshold issue of the propriety of the interlocutory appeal, thereby addressing the FAA coverage question that has so divided the circuits.

2. On its merits, the novel procedural/substantive distinction the Seventh Circuit fashioned in this case has little to recommend it as the answer to question concerning FAA coverage of collective bargaining agreements that has so perplexed the federal courts of appeal.

The court below fashioned that distinction in an effort to reconcile the doctrinal incoherence created by prior cases in the Seventh Circuit that had applied the FAA to certain collective bargaining agreements. Pet. App. 8-9. As the Seventh Circuit pointed out (Pet. App. 6), *this* Court has never applied the FAA to collective bargaining agreements, and in fact has expressly refused to do so when presented with the opportunity: In *United Paperworkers v. Misco*, 484 U.S. 29 (1987), a case concerning enforcement of an arbitration clause in a col-

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[8] Justice Stevens, joined by Justice Marshall, would have reached the question and concluded that the exclusion clause applies to *all* employment contracts. *Id.* at 36.

lective bargaining agreement, this Court stated that "[t]he [Federal] Arbitration Act does not apply to 'contracts of employment' . . . but the federal courts have often looked to the Act for guidance in labor arbitration cases. . . ." *Id.* at 40 n.9; *see also Gilmer*, 500 U.S. at 40-41 (Stevens, J., dissenting). And indeed, this Court has made clear, from *Lincoln Mills* onward, that the substance of the tripartite contractual relations created by a collective bargaining agreement, in which the employer and union are parties to an agreement establishing the contract-based rights of individual employees, is regulated not by state contract law or by the FAA, but by the federal labor laws and the federal common law developed under LMRA § 301. *Lincoln Mills*, 353 U.S. at 456-57.

It was in an attempt to reconcile this established legal regime governing collective bargaining agreements with its prior holdings applying the FAA to collective bargaining agreements in some circumstances that the Seventh Circuit created its unwieldy procedural/substantive distinction. But the Seventh Circuit pointed to no basis for its procedural/substantive distinction in the statutory language of either the FAA or the federal labor laws, and the distinction is likely only to proliferate further confusion as courts in the Seventh Circuit attempt to determine precisely which aspects of the FAA regulatory scheme applies to collective bargaining agreements and which do not.[9]

There are two other, more traditional approaches to the FAA contract of employment coverage question that are considerably more promising than the Seventh Circuit's innovation in answering the question whether and to what degree the FAA covers collective bargaining agreements:

(a) First, it is our position that the proper—and not surprisingly, the most sensible—interpretation of the FAA

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[9] *See e.g.*, FAA § 9, 9 U.S.C. § 9 (requirements governing motion to confirm arbitration award); 9 U.S.C. § 12 (notice requirements for motion to vacate or modify award).

is that § 1 of the Act excludes from the Act's coverage *all* contracts of employment, including both individual contracts of employment and collective bargaining agreements.

The FAA was enacted in 1925 to govern *commercial* arbitration, not labor disputes. *See Gilmer,* 500 U.S. at 39-40 (Stevens, J., dissenting); Matthew W. Finkin, " 'Workers' Contracts' Under the United States Arbitration Act: An Essay in Historical Clarification," 17 Berkeley J. Employment & Labor L. 282 (1996); Matthew W. Finkin, "Employment Contracts Under the FAA Reconsidered," 98 Labor Law. J. 329 (1997). The FAA's affirmative coverage thus extends to all contracts evidencing "transactions involving commerce," 9 U.S.C. § 2; of these contracts, section 1 of the Act exempts contracts of employment for workers "engaged in commerce."

The key statutory question, then, is whether § 1's exclusion of contracts of employment for workers "engaged in commerce" term is broader, narrower, or coextensive with the scope of the Act's affirmative coverage of "transactions involving commerce." The legislative history and historical record make clear that the multiple drafters of the Act regarded the two locutions as interchangeable, and that § 1 was intended to exclude from the Act *all* contracts of employment that were otherwise within its sweeping coverage. *Gilmer,* 500 U.S. at 40-41 (Stevens, J., dissenting); Finkin, *supra,* 98 Labor L.J. at 330-332.

The narrower reading, limiting the exclusionary clause to contracts of employment of workers who physically transport goods in commerce, leads to the anomalous result that the Act covers *only* those contracts that *least* implicate the Commerc Clause concerns that justify the Act, and *excludes* precisely those contracts—governing workers who actually move goods in commerce—most closely connected to interstate and foreign commerce. And, since a single collective bargaining agreement can cover both workers directly engaged in transportation of goods

(e.g. truckers) and those who are not so engaged but who work closely with transportation industry employees (e.g., warehouse workers like Mr. Pryner here), the narrow interpretation of the exclusion creates the further oddity that workers covered by the same collective bargaining agreement may be subject to two different legal regimes—the FAA for the warehousemen, and the federal common law for the truckers. Nothing in the FAA lends credence to the view that Congress would have intended this result. To the contrary, the available evidence makes clear that Congress never intended the FAA to apply to employment disputes at all, and thus excluded from the scope all contracts of employment.

(ii) Even if *all* contracts of employment are not outside the coverage of the FAA, this Court has already indicated in *Misco* that all *collective bargaining agreements,* at least, are governed by § 301 of the LMRA with respect to all arbitration-related issues, not by the FAA. 484 U.S. at 40 n.9. The majority of the courts of appeal that have addressed the issue of FAA coverage of collective bargaining agreements have followed *Misco,* albeit with little explanation. *See* pp. 8-9, *supra.*

The basis for the *Misco* statement, and for *Lincoln Mills'* failure to rely on the FAA as a basis for enforcing arbitration clauses contained in collective bargaining agreements, is, we believe, that this Court has recognized that the issues raised in a case such as this one simply do not fit within the model Congress had in mind when it enacted the FAA. In particular, this case raises issues on the merits concerning whether an individual employee is to be bound by an agreement between an employer and an exclusive representative chosen according to the National Labor Relations Act, 29 U.S.C. § 151 et seq., entered into as the result of a bargaining process regulated by that Act, 29 U.S.C. § 158(a)(5). Resolving those issues requires an understanding of the nature of collective representation, and of the federal common law of collec-

tive bargaining agreements developed under *Lincoln Mills*, as that law applies to arbitration clauses. The simple standards created by the FAA for determining the very different question whether two business people who have agreed to arbitrate their disputes are to be required to do so simply have no useful application to the complex, tripartite, labor policy issues that arise when an employer attempts to require an individual employee, who did not himself agree to the collective bargaining agreement, to abide by it.[10] As *Misco* and the § 301 statute of limitations cases indicate (*see* note 4, *supra*), this Court has so understood since *Lincoln Mills*.

It is true, as *Misco* stated, that the provisions of the FAA may provide guidance in collective bargaining agreement arbitration cases. But here, unless FAA § 16 applies *directly*, there was no appellate court jurisdiction over this interlocutory appeal.

For the reasons stated in our Brief in Opposition, Tractor Supply's petition for writ of certiorari in No. 96-1830 should be denied. If it is granted, however, this Court should grant this cross-petition, and either should decide that FAA § 1 excludes all employment contracts from the FAA or, alternatively, should reiterate and explain the ramifications of its consistent policy of deciding questions concerning the application of arbitration clauses contained in collective bargaining agreements under LMRA § 301, and outside the parameters of the FAA.

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[10] As we point out in our Brief in Opposition in No. 96-1830, this case is not in fact one in which the union agreed to the arbitration of statutory rights requirement the employer is attempting to enforce against the individual employer. Br. at 6-9. For present purposes, however, the salient point is that even if there were a clear agreement between the employer and the union requiring the submission of federal statutory discrimination claims to the collective bargaining agreement grievance/arbitration scheme, the labor laws, not the FAA, would provide the applicable principles for determining whether that agreement should be enforced against an individual employee.

CONCLUSION

For the reasons stated above, if the Court grants the petition for a writ of certiorari on the merits, this cross-petition for a writ of certiorari should be granted.

Respectfully submitted,

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